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ENVIRONMENTAL TOBACCO SMOKE AND ITS EFFECT ON CHILDREN: CONTROLLING SMOKING IN THE HOME

Allison D. Schwartz*

I. INTRODUCTION

Smoking is for many families a normal part of everyday life. Unfortunately, the children of these families must grow up in smoke.¹ Medical evidence has established that smoking causes lung cancer, heart disorders, bronchitis, emphysema, and other disorders in persons who smoke.² Over the past few years, medical and scientific studies have informed the public of cigarette smoke's threat to nonsmokers' health.³ Given the number of pollutants contained in tobacco smoke,⁴ nonsmokers' inhalation of tobacco smoke is a serious public health concern.⁵

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¹ LYNN MICHELL, GROWING UP IN SMOKE 1 (1990); A child "is a person, also known as a minor, from birth to legal age of maturity for whom a parent and/or caretaker, foster parent, public or private home, institution, or agency is legally responsible." PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, INTERDISCIPLINARY GLOSSARY ON CHILD ABUSE AND NEGLECT: LEGAL, MEDICAL, SOCIAL WORK TERMS 8 (1978); At common law [a child is] one who had not attained the age of 14 years, though the meaning now varies in different statutes. BLACK'S LAW DICTIONARY 239 (6th ed. 1990).

² PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH EDUC. & WELFARE, SMOKING & HEALTH 33 (1964); see also Laura Zubinsky, *The Proposed Illinois Clean Indoor Air Act: The Right of Nonsmokers To A Smoke-Free Environment*, 18 J. MARSHALL L. REV. 177, 177 (1984).

³ MICHELL, *supra* note 1, at 2.

⁴ Zubinsky, *supra* note 2, at 178. "A burning cigarette is a small chemical factory that fills the air with more than 4,000 chemicals." Stanton A. Glantz & Richard A. Daynard, *Safe-guarding the Workplace: Health Hazards of Secondhand Smoke*, 27 TRIAL 37, 37 (June 1991). "Among them are 43 known carcinogens and over 400 other toxins, including nicotine, an addictive drug." *Id.*

⁵ Jana T. Whitgrove, *Warning: California Antismoking Laws May Be Dangerous To Your Health- An Analysis of Nonsmokers' Rights in the Workplace*, 14 PAC. L.J. 1145, 1147 (1983) (passive smoking raises concerns about possible serious public health problems); see also

The publication of the public health risks that tobacco smoke poses to the health of nonsmokers⁶ has increased public awareness of the need for effective control of tobacco smoke pollution.⁷ Thus, nonsmokers are claiming a right to a smoke-free environment.⁸ The debate over the right to a smoke-free environment between smokers and nonsmokers persists: smokers assert that they have a constitutional right to smoke;⁹ nonsmokers assert that they have an equal right to freedom from sickness or irritation caused by tobacco smoke.¹⁰ Nonsmokers have been turning to the courts and their state legislatures for protection.¹¹ In response, many states have enacted laws to protect nonsmokers from the damaging effects of tobacco smoke in enclosed public places.¹²

MICHELL, *supra* note 1, at 12. Nonsmoker inhalation of tobacco smoke is known as involuntary, passive, or secondhand smoking. *Id.*

⁶ PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, *THE HEALTH CONSEQUENCES OF SMOKING: A REPORT OF THE SURGEON GENERAL* 117-35 (1972). The health risk to nonsmokers ensues, in part, from the inhalation of carbon monoxide in tobacco smoke. *Id.* Even minimal exposure to carbon monoxide affects a person's cardiovascular and central nervous system. *Id.* Research has shown that carbon monoxide exposure causes lightheadedness, loss of memory, double vision, and lack of concentration. *Id.* See also PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH AND HUM. SERVICES, *THE HEALTH CONSEQUENCES OF INVOLUNTARY SMOKING: A REPORT OF THE SURGEON GENERAL* 5-16 (1986) [hereinafter *1986 Surgeon General Report*]; U.S. ENVIRONMENTAL PROTECTION AGENCY, *HEALTH EFFECTS OF PASSIVE SMOKING: ASSESSMENT OF LUNG CANCER IN ADULTS AND RESPIRATORY DISORDERS IN CHILDREN* (External Draft), 55 Fed. Reg. 25,874 (1990) [hereinafter *Assessment of Lung Cancer*]; NATIONAL HEALTH INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, U.S. DEP'T OF HEALTH AND HUM. SERVICES, *ENVIRONMENTAL TOBACCO SMOKE IN THE WORKPLACE: LUNG CANCER AND OTHER HEALTH EFFECTS* 1-14 (June 1991) [hereinafter *Health Effects of Passive Smoking*].

⁷ Morley Swingle, *The Legal Conflict Between Smokers and Nonsmokers: The Majestic Vice Versus the Right to Clean Air*, 45 MO. L. REV. 444, 449-50 (1980).

⁸ Zubinsky, *supra* note 2, at 179. Tobacco smoke is a major source of indoor air pollution. Note, *Legislation for Clean Air: An Indoor Front*, 82 YALE L.J. 1040, 1043 (1973). Author cites to three separate health problems associated with the contamination of indoor environments by smoking. *Id.* at 1043-1046.

⁹ Alan S. Kaufman, *Where There's Smoke There's Ire: The Search for Legal Paths to Tobacco-Free Air*, 3 COLUM. J. ENVTL. L. 62, 68 (1976). Even if a person has a constitutionally protected right to smoke, that right is not absolute; it is limited by a state's police power to protect the public health, safety and welfare of its citizens. See *id.* at 70.

¹⁰ See, e.g., *Alexander v. California Unemployment Ins. Appeals Bd.*, 163 Cal. Rptr. 411, 413, 104 Cal. App. 3d 97, 97 (1980) (worker allergic to smoke has right to terminate employment and collect unemployment insurance benefits where tobacco smoke was present because such work would be harmful to her health); *Shimp v. New Jersey Bell Tel.*, 368 A.2d 408, 415 (N.J. Super. Ct. 1976) (right of an individual to risk his or her health does not include right to jeopardize health of those who must remain around him or her).

¹¹ See, e.g., *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897, 899 (5th Cir. 1978), cert. denied, 439 U.S. 1073 (1979); *Shimp*, 368 A.2d at 414.

¹² William K. Grisham, Jr., *Passive Smoking: Are We Our Brother's Keeper?*, 13 AM. J. TRIAL ADVOC. 901, 909-11, n.48 (1989). Author cites comprehensive list of state and local

Tobacco smoke is most harmful to those who inhale it in enclosed space over a prolonged period of their lives,¹³ especially children raised in homes with smokers.¹⁴ Research has established a nexus between inhaling tobacco smoke in childhood and a wide range of health problems, notably respiratory problems.¹⁵ Recent research has demonstrated that these health problems extend far beyond infancy, involving an increased risk of lung cancer in later life.¹⁶

Health experts have not publicized the fact that numerous children grow up inhaling secondhand smoke. The public has been reluctant to acknowledge that smokers hurt themselves when they smoke. Only recently the public has begun to grasp that smoking also harms nonsmokers. Therefore, smokers are unlikely to accept easily the difficult truth that their smoking may harm their children.¹⁷

This Comment examines the problem of tobacco smoke pollution and the effects of environmental tobacco smoke (ETS) on children's health, and questions whether in-home smoking can be controlled. Section II of the Comment describes indoor air pollution and ETS. It begins with a description of indoor air pollution's threat to health and ways to mitigate ambient tobacco smoke. It concludes with a

government smoking regulations. *Id.* But see ACTION ON SMOKING AND HEALTH (ASH), *Smoker's Rights Laws*, 21 SMOKING AND HEALTH REV. 2, 2 (May-June 1991). Smokers' rights laws are proliferating, establishing a legal right to smoke under the guise of eliminating so-called "discrimination." *Id.* Where enacted, employers face the threat of the tobacco industry financing law suits. *Id.*

¹³ See MICHELL, *supra* note 1, at 11.

¹⁴ 1986 Surgeon General Report, *supra* note 6, at 7; see also *Assessment of Lung Cancer*, *supra* note 6, at 1-6. According to the American Academy of Pediatrics, nine to twelve million American children under five years of age may be exposed to cigarette smoke in the home. *Id.*

¹⁵ See 1986 Surgeon General Report, *supra* note 6, at 10. There exists a link between acute and chronic respiratory disease and involuntary exposure to tobacco smoke; the evidence is strongest in infants. *Id.* See also *id.* at 13-14; Raphael J. Witorsch, *Parental Smoking and Respiratory Health and Pulmonary Function in Children: A Review of the Literature and Suggestions for Future Research*, in ENVIRONMENTAL TOBACCO SMOKE: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM AT MCGILL UNIVERSITY 1989 206, 206-07 (Donald J. Ecobichon et al. eds., 1989); but see THE TOBACCO INST., SCIENTIFIC COMMENTS CRITICAL OF THE DRAFT EPA ETS RISK ASSESSMENT 1 (1990). The Tobacco Institute claims that the studies used in the EPA draft do not consider adequately the numerous significant environmental factors that could confound reported associations between children's respiratory disorders and exposure to environmental tobacco smoke. *Id.* at 12. The Institute states that the data presented does not substantiate the draft's statement that passive smoking in early childhood is associated with decreased lung function in childhood and with a small reduction in their rate of pulmonary growth and development. *Id.* at 16. According to the Institute, scientific evidence does not support the draft's conclusions on respiratory symptoms and respiratory infections in children of smoking parents. *Id.* at 27.

¹⁶ MICHELL, *supra* note 1, at 11.

¹⁷ See *id.* at 25-26.

discussion of the components of ETS and its health effects on children. Section III presents the judicial response to nonsmokers' claims. Section IV examines anti-smoking legislation, describing the evolution of anti-smoking legislation and the constitutionality of smoking restrictions. Section V looks at legislative and judicial control of the parents' treatment of children in the home, discussing both the existence of parental control laws and their limitations. Section VI questions the validity of restricting smoking in the home. Finally, this Comment concludes that possible legislative and judicial means of controlling smoking within the home may not be effective in reducing children's health problems caused by ETS, and that ETS may be a devastating health problem that the law cannot solve.

II. INDOOR AIR POLLUTION AND ENVIRONMENTAL TOBACCO SMOKE

A. Indoor Air Pollution—The Hidden Health Threat

Many scientists view the indoor air pollution problem as a serious health threat.¹⁸ One activist described the threat as "an epidemic of major proportions."¹⁹ In fact, the indoor air pollution problem may be considerably more serious than the outdoor air pollution problem.²⁰ Concentrations of air pollutants within enclosed places often exceed concentrations found in outdoor ambient air.²¹ This heightened concern over the dangers of indoor air pollution is warranted because people spend most of their times indoors, thus increasing the frequency or prolongation of exposure to air pollutants.²² Although indoor air pollution affects the population, it particularly affects the young, the old, and the ill because they are more susceptible to the effects of pollution and more likely to be indoors.²³

Recent energy conservation trends have only exacerbated the indoor air pollution dilemma.²⁴ The construction of more homes,

¹⁸ See Lawrence S. Kirsch, *Behind Closed Doors: Indoor Air Pollution and Governmental Policy*, 6 HARV. ENVTL. L. REV. 339, 339 (1982).

¹⁹ Conservation Foundation, *The Epidemic of Indoor Air Pollution*, 60 BUS. AND SOC. REV. 53, 53 (1987).

²⁰ *Id.*

²¹ *Id.* A five-year study by the EPA indicates that concentrations of chemicals indoors are often ten times greater than outdoors and that maximum indoor exposures are at least one hundred times greater than maximum outdoor exposures. *Id.* See also Note, *supra* note 8, at 1042-46.

²² Conservation Foundation, *supra* note 19, at 53.

²³ *Id.*; see also, Note, *supra* note 8, at 1042.

²⁴ See Conservation Foundation, *supra* note 19, at 53.

offices, and public buildings with tighter or total system-controlled indoor environments reduces ventilation thereby making indoor air pollution a concern for homeowners and employers.²⁵ These new weatherized buildings, designed to be more energy-efficient, often expose occupants to poor indoor air quality. Tightly closed windows and double-insulated walls and ceilings virtually eliminate natural ventilation and circulation of fresh air.²⁶ These buildings cause "sick building syndrome"—occupants suffering from dry throats, headaches, fatigue, sinus congestion, skin irritation, coughing, dizziness, and nausea.²⁷ In these energy-efficient buildings, outdoor air does not replace indoor air adequately, thus allowing pollutants to accumulate and circulate throughout the building.²⁸ As a result of these increased air pollutant concentrations, the trend toward energy-efficient buildings may lead to serious health consequences for their occupants.²⁹

The public is largely unaware of the indoor air pollution problem.³⁰ Because they are not aware of the health hazards indoor air pollutants pose, people consider their homes and office buildings to be safe havens from the more widely recognized pollutants.³¹ Therefore, people neither take the precautions necessary to protect themselves from the effects of indoor pollutants nor demand appropriate governmental actions.³²

Several federal and state agencies, however, have taken remedial actions.³³ For example, in response to indoor air quality concerns, the American Society of Heating, Refrigeration and Air Conditioning Engineers (ASHRAE) recently proposed increasing its ventilation standard for office buildings to fifteen to twenty cubic feet per minute (cfm) per person—a three- to four-fold increase in fresh air requirements from the 1981 standard of five cfm per person.³⁴

According to health experts, many indoor air pollutant mitigation measures are available at a relatively low cost.³⁵ Some measures

²⁵ THE TOBACCO INST., *INDOOR AIR POLLUTION: IS YOUR WORKPLACE MAKING YOU SICK?* 2 (May 1988) [hereinafter *Indoor Air Pollution*].

²⁶ *Id.* at 2-3.

²⁷ *Id.* at 2.

²⁸ Michael Gold, *Indoor Air Pollution*, 80 *SCIENCE* 33, 33 (Mar./Apr. 1980).

²⁹ *Indoor Air Pollution*, *supra* note 25, at 4-5.

³⁰ Conservation Foundation, *supra* note 19, at 53; *see also* Note, *supra* note 8, at 1042 (hazards of smoke to nonsmokers, while not well known, are significant).

³¹ Conservation Foundation, *supra* note 19, at 53.

³² *Id.* at 54.

³³ *Id.*; *see also* Note, *supra* note 8, at 1047-50.

³⁴ *Indoor Air Pollution*, *supra* note 25, at 5.

³⁵ Conservation Foundation, *supra* note 19, at 54.

only entail changes in personal behavior.³⁶ Secondhand tobacco smoke is one area where changes in personal behavior have reduced indoor air pollution.³⁷ Actions against secondhand smoke include legislation restricting smoking in public places,³⁸ organizations refusing to hire smokers, large companies prohibiting smoking altogether or limiting it to certain areas within the building,³⁹ and non-smokers bringing civil suits to force their employers to provide clean-air work environments.⁴⁰ With all the evidence of the dangers of both passive smoking and indoor air pollution, these restrictions on smoking seem likely to continue.⁴¹ It is time to treat ambient tobacco smoke as the air pollutant it is and to subject the tobacco industry to the same sort of controls that all other polluting industries must bear.⁴² Some of the controls suggested include limitations on tar and nicotine content in the sidestream smoke to which nonsmokers are exposed, control of cigarette additives, and requirements for self-extinguishing cigarettes.⁴³

³⁶ *Id.*

³⁷ *Id.* at 54-55.

³⁸ See Dennis, H. Vaughn, *Smoking in the Workplace: A Management Perspective*, 14 EMPLOYEE REL. L.J. 359, 377-78 (1988); Note, *supra* note 8, at 1049. According to a Bureau of National Affairs (BNA) survey of statutes regulating smoking in the workplace, thirty-two states and the District of Columbia have adopted measures governing public employees. Vaughn at 377-78. "Public place" statutes typically provide that smoking is limited to designated areas, but do not ban smoking altogether. *Id.* These statutes apply primarily to government or municipal buildings because those buildings are open to and regularly visited by the general public. *Id.* Some enactments that govern public employers are: ARIZ. REV. STAT., ANN. § 36-601.01 *et seq.* (West Supp. 1987); CAL. GOV'T CODE § 19262 (Deering Supp. 1988); MASS. ADMIN. BUL. 87-1 (Mar. 11, 1987). *Id.* at 386 n. 42.

³⁹ See Conservation Foundation, *supra* note 19, at 54; see also John C. Fox & Bernadette M. Davison, *Smoking in the Workplace: Accommodating Diversity*, 25 CAL. W. L. REV. 215, 216 (1989). Twelve percent of major employers in the United States ban smoking on the job. *Id.* Of the employers that ban smoking in the workplace, many appear to do so around food preparation stations and near combustible materials. *Id.*

⁴⁰ See, e.g., McCarthy v. Dep't of Social & Health Services, 759 P.2d 351, 354 (Wash. 1988) (employer's common law duty to provide safe workplace includes duty to provide working environment reasonably safe from tobacco smoke); Shimp v. New Jersey Bell Tel., 368 A.2d 408, 409 (N.J. Super. Ct. 1976) (court enjoined employer to ensure smoke-free workplace).

⁴¹ See Conservation Foundation, *supra* note 19, at 54.

⁴² *Id.* at 55 (quoting James L. Repace); see also Note, *supra* note 8, at 1050-53 (comprehensive federal regulation of indoor air pollution similar to that of outdoor pollution); but cf. *Indoor Air Pollution*, *supra* note 25, at 3. Visible tobacco smoke, in almost all cases, is a symptom, not a cause of the problem. *Id.* In fact, the government's National Institute for Occupational Safety and Health (NIOSH) and private investigators have concluded that environmental tobacco smoke is a cause of building occupants' discomfort in only two to four percent of cases investigated. *Id.*

⁴³ Conservation Foundation, *supra* note 19, at 55.

B. Environmental Tobacco Smoke (ETS)

1. The Components of ETS

A smoker is not the only person who inhales the more than 3,800 compounds in cigarette smoke.⁴⁴ Medical and scientific research has concluded that tobacco smoke is a complex “chemical cocktail” made up of thousands of tiny particles and gases. The particles include those from tar, nicotine, benzene, and benzpyrene. The gases include carbon monoxide, ammonia, hydrogen, cyanide, and formaldehyde.⁴⁵

Smokers actively inhale cigarette smoke only ten percent of the time they are smoking, the remaining ninety percent of the time the cigarette idly burns.⁴⁶ The environmental tobacco smoke (ETS) from this idling cigarette pollute the air surrounding the smoker.⁴⁷ Non-smokers who breathe ETS are called “passive” or “involuntary” smokers.⁴⁸

The major source of environmental tobacco smoke is sidestream smoke—burning tobacco smokers emit between puffs.⁴⁹ The remainder of ETS consists of exhaled mainstream smoke—which escapes from the burning tobacco during the smoker’s puff-drawing—and gases which diffuse through the cigarette paper while the cigarette burns.⁵⁰

A cigarette burns at a low temperature when it is not actively inhaled.⁵¹ Because this idling sidestream smoke results from combustion at a lower temperature, it contains significantly higher concentrations of many toxic and carcinogenic compounds found in mainstream smoke.⁵² Mainstream smoke is produced when a smoker is inhaling on the cigarette, thereby drawing oxygen through the lit end and increasing the burning temperature.⁵³ Hotter fires burn

⁴⁴ See NATIONAL RESEARCH COUNCIL, ENVIRONMENTAL TOBACCO SMOKE: MEASURING EXPOSURES AND ASSESSING HEALTH EFFECTS 2 (1986) [hereinafter *Measuring Exposures*].

⁴⁵ MICHELL, *supra* note 1, at 13.

⁴⁶ Glantz, *supra* note 4, at 37.

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ See *Measuring Exposures*, *supra* note 44, at 2; ACTION ON SMOKING AND HEALTH (ASH), THE EFFECTS OF INVOLUNTARY SMOKING 1 (Sept. 1989) [hereinafter *Effects of Involuntary Smoking*].

⁵⁰ *Measuring Exposures*, *supra* note 44, at 2.

⁵¹ Glantz, *supra* note 4, at 37.

⁵² See *Effects of Involuntary Smoking*, *supra* note 49, at 1.

⁵³ See Glantz, *supra* note 4, at 37.

cleaner and produce less air pollution.⁵⁴ Thus, because the majority of smoke that a passive smoker inhales does not have the benefit of a high burning temperature or filtration by the cigarette itself, it is much more contaminated with tobacco particles and gas than the mainstream smoke that the smoker inhales.⁵⁵

Laboratory tests of cigarette smoke confirm that sidestream smoke has higher concentrations of some of the four thousand poisons contained within tobacco smoke.⁵⁶ There is twice as much tar and nicotine in sidestream smoke than in the smoke inhaled directly from the cigarette. There are also three times as much carbon monoxide, which robs the blood of oxygen; thirty times as much zinc and nickel; up to fifty times more formaldehyde; twenty to one hundred times as much cancer-causing N-nitrosamine; and up to one hundred and seventy times as much ammonia.⁵⁷ These chemicals effect everyone who inhales them. These effects are more profound on children, whose bodily tissues are still developing.⁵⁸

2. ETS's Effects on Children's Health

a. Acute, Noxious Effects

The most common acute physical irritations associated with children's exposure to ETS are red, tearing, and burning eyes; sneezing; discharging and irritated noses; coughing; hoarseness; and irritated throats.⁵⁹ For some children, eye tearing can be so intense, it is incapacitating.⁶⁰ Children also object to the smell of tobacco smoke.⁶¹

The National Research Council notes that particle filtration of tobacco smoke—removing smoke particles via ventilation, does little to reduce smoke odor and irritation.⁶² Particle filtration's inability to

⁵⁴ *Id.*

⁵⁵ *See id.*

⁵⁶ Tod. W. Burke, *Up in Smoke: Secondhand Smoke Health Risks Have Staff and Inmates Fuming*, 52 CORRECTIONS TODAY 152, 152 (July 1990).

⁵⁷ *Id.*

⁵⁸ *Measuring Exposures*, *supra* note 44, at 9.

⁵⁹ *See Effects of Involuntary Smoking*, *supra* note 49, at 1; *Measuring Exposures*, *supra* note 44, at 8.

⁶⁰ *Measuring Exposures*, *supra* note 44, at 8. According to one thirteen year old girl, "When my mum's friends come round I have to go out of the room because they smoke and the smoke goes for my eyes and also smoke blocks my throat and it is horrible." MICHELL, *supra* note 1, at 17. A twelve year old boy states "When I sit next to someone who is smoking my eyes go watery and nippy and I start to choke and I hate the smell of smoke." *Id.* at 18.

⁶¹ *See Measuring Exposures*, *supra* note 44, at 8; *see also* MICHELL, *supra* note 1, at 17.

⁶² *Measuring Exposures*, *supra* note 44, at 8.

reduce tobacco smoke odor and irritation suggests that tobacco smoke's gas constituents cause its noxious effects.⁶³

b. Respiratory Rate, Lung Function and Other Health Considerations in Children

In infancy, exposure to ETS may increase susceptibility to viral respiratory infections that in turn may have a carryover effect into later childhood and adult life.⁶⁴ Passive smoking also impairs infants' immune systems.⁶⁵ Respiratory problems, such as wheezing, coughing, and sputum production, are higher in children of smoking parents than in children of nonsmoking parents.⁶⁶ A 1984 study of over 10,000 children between six and nine years old found that the prevalence of persistent cough and wheeze was higher in children whose parents smoked than in children whose parents did not smoke.⁶⁷ Also, infants who have at least one smoking parent more frequently have respiratory tract infections manifested as pneumonia and bronchitis than infants of nonsmoking parents.⁶⁸ Infants of smoking parents are hospitalized for respiratory infections more frequently than children of nonsmokers.⁶⁹

Researchers associate parental smoking with decreased pulmonary function and lung growth in smokers' children.⁷⁰ Children with one or more smoking parents showed slower lung growth rates.⁷¹

⁶³ *Id.*

⁶⁴ ACTION ON SMOKING AND HEALTH (ASH), EFFECTS OF TOBACCO SMOKE ON CHILDREN 1 (Sept. 1989) [hereinafter *Effects of Tobacco Smoke on Children*].

⁶⁵ *Id.* at 1.

⁶⁶ *Id.*; *Measuring Exposures*, *supra* note 44, at 9; see also Daniel R. Neuspiel et al., *Parental Smoking and Post-Infancy Wheezing in Children: A Prospective Cohort Study*, 79 AM. J. PUB. HEALTH 168, 168 (1989); *Surgeon General Report*, *supra* note 6, at 7. The children of smoking parents compared with the children of nonsmoking parents have an increased recurrence of respiratory problems, and slightly smaller rates of increased lung functions as their lungs mature. *Id.*

⁶⁷ *Effects of Tobacco Smoke on Children*, *supra* note 64, at 2.

⁶⁸ *Measuring Exposures*, *supra* note 44, at 9; see also *Effects of Tobacco Smoke on Children*, *supra* note 64, at 1.

⁶⁹ *Measuring Exposures*, *supra* note 44, at 9.

⁷⁰ Neuspiel, *supra* note 66, at 168; see also Ira B. Tager et al., *Effects of Parent Cigarette Smoking on the Pulmonary Function of Children*, 110 AM. J. EPIDEMIOLOGY 15, 15 (1979); Scott T. Weiss et al., *Persistent Wheeze: Its Relation to Respiratory Illness, Cigarette Smoking, and Level of Pulmonary Function in a Population of Sample Children*, 122 AM. REV. RESPIRATORY DISORDERS 697, 697 (1980). But cf. THE TOBACCO INST., RESPIRATORY EFFECTS IN CHILDREN AND ADULTS 1 (scientists conclude that reported statistical associations between ETS and respiratory symptoms in children are frequently inconsistent and do not make adjustments for confounding variables).

⁷¹ See *Effects of Tobacco Smoke on Children*, *supra* note 64, at 2; *Measuring Exposures*, *supra* note 44, at 9.

Decreased lung growth rates may lead to an increase in the lung's susceptibility to chronic obstructive lung disease.⁷² Initially, health experts thought that passive smoking affected only young children. Studies now show that the health risks of living with smokers and exposure to ETS as a child may continue into the child's later years.⁷³ For example, there may be a link between passive smoking in childhood and the risk of lung cancer in later life.⁷⁴

A number of studies have linked household exposure to ETS with increased rates of chronic ear infections and effusions in children.⁷⁵ Chronic ear effusion is a common reason for a child's admission to a surgical hospital.⁷⁶ Hearing loss and consequent speech pathology can result from chronic ear infections or effusions in young children.⁷⁷

Studies also have reported that smokers' children have reduced growth and development.⁷⁸ Growth is an especially difficult phenomenon to study because many factors, such as genetics, nutrition, and ethnicity play important roles. Therefore, these studies require further corroboration to determine the nature of this association.⁷⁹ Nevertheless, children of smoking families may be affected seriously by ETS exposure in their home. Unaware, smoking parents are harming their children by daily exposing them to cigarette smoke.⁸⁰ To protect their children's health, nonsmoking family members are turning to the courts in an attempt to restrict other family members from smoking within the home.⁸¹

III. LEGAL RESTRICTIONS ON SMOKERS

A. *Constitutional Claims*

Many people believe that the right to breathe clean air and live in a clean and healthy environment is so fundamental that it must be constitutionally protected.⁸² The United States Constitution, how-

⁷² *Effects of Tobacco Smoke on Children*, *supra* note 64, at 2.

⁷³ See MICHELL, *supra* note 1, at 17.

⁷⁴ *Id.*

⁷⁵ *Measuring Exposures*, *supra* note 44, at 272.

⁷⁶ *Passive Smoking and Childhood Otitis*, 298 BRITISH MED. J. 1549 (1989), reprinted in 41 AM. FAM. PHYSICIAN 937, 937 (Mar. 1990).

⁷⁷ *Measuring Exposures*, *supra* note 44, at 272.

⁷⁸ See *id.* at 274.

⁷⁹ See *id.* at 12.

⁸⁰ See MICHELL, *supra* note 1, at 15.

⁸¹ See *Satalino v. Satalino*, No. 11440-86 (N.Y. Sup. Ct., Oct. 19, 1990); *Roofeh v. Roofeh*, 525 N.Y.S.2d 765 (Sup. Ct. 1988).

⁸² Lynn F. Vuich, *Toward Recognition of Nonsmokers' Rights in Illinois*, 5 LOY. U. CHI. L.J. 610, 614 (1974).

ever, lacks explicit language supporting this belief.⁸³ The arguments for a constitutional right to be free from tobacco smoke resemble those arguments for constitutional protection of the environment.⁸⁴ Due to absence of explicit language in the Constitution, plaintiffs have urged courts to infer a constitutional guarantee of the right to freedom from tobacco smoke and to a clean environment from the Ninth Amendment, the First Amendment, and the due process clause.⁸⁵ These arguments have been unsuccessful.⁸⁶

Nonsmokers have advanced the Ninth Amendment as a basis for their right to environmental protection and their right to breathe clean air.⁸⁷ The Ninth Amendment guarantees that certain rights explicit in the Constitution will not be interpreted as to deny other rights people hold.⁸⁸ Nonsmokers believe that the Ninth Amendment guarantees fundamental liberties not specifically enumerated in the Bill of Rights, and that one of these liberties is the right to a clean and healthy environment free from tobacco smoke.⁸⁹ Although the Supreme Court has used the Ninth Amendment to protect rights not explicitly stated in the Constitution,⁹⁰ the Ninth Amendment has not proved to be an effective protector of environmental rights.⁹¹ For example, in *Gasper v. Louisiana Stadium and Exposition District*⁹² the United States District Court for the Eastern District of Louisiana dismissed the plaintiffs' claim that allowing smoking in the Louisiana Superdome was a violation of their fundamental right to breathe clean air as protected by the Ninth Amendment.⁹³ The

⁸³ See *id.*

⁸⁴ Paul Axel-Lute, *Legislation Against Smoking Pollution*, 6 ENVTL. AFF. 345, 350 (1977-78).

⁸⁵ See *id.*; see also Vaughn, *supra* note 38, at 360; Vuich, *supra* note 82, at 615.

⁸⁶ Axel-Lute, *supra* note 84, at 350-51; e.g., *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897, 899 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Public Utilities Comm'n v. Pollack*, 343 U.S. 451, 463-66 (1952).

⁸⁷ See *Gasper*, 577 F.2d at 899 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Pinkey v. Ohio Env'tl. Protection Agency*, 375 F. Supp. 305, 309-10 (N.D. Ohio 1974).

⁸⁸ U.S. CONST. amend IX. "[T]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by people."

⁸⁹ See Vuich, *supra* note 82, at 615.

⁹⁰ See, e.g., *Roe v. Wade*, 410 U.S. 113, 116 (1973) (majority found that right of personal privacy, or guarantee of certain areas or zones of privacy, does exist under the Constitution); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (majority found several of Bill of Rights' guarantees create a penumbra or zone of personal rights protection).

⁹¹ Vuich, *supra* note 82, at 615; see, e.g., *Fed. Employees for Nonsmokers Rights v. United States*, 446 F. Supp. 181, 185 (D.C. Cir. 1978), *aff'd without opinion*, 598 F.2d 310 (2d Cir.), *cert. denied*, 444 U.S. 926 (1979); *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897, 899 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

⁹² 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

⁹³ *Id.* at 899.

court concluded that to find a vested constitutional right to be free from tobacco smoke would mock the Constitution's lofty purposes.⁹⁴

Nonsmokers alleging that their exposure to tobacco smoke violates their First Amendment right to receive ideas and information freely also have failed.⁹⁵ The plaintiffs in *Gasper* asked the court to enjoin the state-owned Louisiana Superdome from allowing smoking because the smoke impaired their right to enjoy sporting events and had a chilling effect on their First Amendment right to receive others' thoughts and ideas.⁹⁶ In *Kensell v. State of Oklahoma*,⁹⁷ the plaintiff, an employee of the State of Oklahoma, alleged that his exposure to tobacco smoke at work violated his First Amendment rights by impairing his ability to think clearly.⁹⁸ The United States District Court for the Eastern District of Louisiana in *Gasper* and the United States Court of Appeals for the Tenth Circuit in *Kensell*, however, rejected both plaintiffs' First Amendment claims.⁹⁹

The Supreme Court has also rejected plaintiffs' Fifth and Fourteenth Amendment due process claims alleging a right to be free from toxins that imperil life.¹⁰⁰ In *Public Utilities Commission v. Pollack*,¹⁰¹ the Court held that recognizing a private cause of action prohibiting smoking in the Fifth and Fourteenth Amendments would create a legal avenue through which an individual could attempt to control the habits of neighbors.¹⁰² The Court was not prepared to accept such a proposition.¹⁰³

The only successful constitutional claim by a nonsmoker was a claim that involuntary exposure to smoke while in prison was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment.¹⁰⁴ In *McKinney v. Anderson*,¹⁰⁵ the United

⁹⁴ *Id.*

⁹⁵ See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

⁹⁶ *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897, 899 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979).

⁹⁷ 716 F.2d 1350 (10th Cir. 1983).

⁹⁸ *Id.* at 1351.

⁹⁹ *Kensell*, 716 F.2d at 1351; *Gasper*, 577 F.2d at 901.

¹⁰⁰ See James C. Byrd et al., *Passive Smoking: A Review of Medical and Legal Issues*, 79 AM. J. PUB. HEALTH 209, 210 (Feb. 1989).

¹⁰¹ 343 U.S. 451 (1952).

¹⁰² See *id.* at 463-66.

¹⁰³ *Id.*; see also *Fed. Employees for Nonsmokers Rights v. United States*, 446 F. Supp. 181, 185 (D.C. Cir. 1978), *aff'd without opinion*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 916 (1979).

¹⁰⁴ See *Avery v. Powell*, 695 F. Supp. 632, 636-40 (D.N.H. 1988); see also Elizabeth B. Thompson, *Constitutionality of an Off-Duty Smoking Ban for Public Employees: Should the State Butt Out?*, 43 VAND. L. REV. 491, 506 (1990).

¹⁰⁵ 924 F.2d 1500 (9th Cir. 1991).

States Court of Appeals for the Ninth Circuit found that prisoners have a constitutional right to be free from exposure to levels of ETS that pose an unreasonable risk of harm to their health.¹⁰⁶ The court noted that the conditions of confinement in a prison are subject to scrutiny under Eighth Amendment standards.¹⁰⁷ When the state takes persons into custody, thereby depriving them of their liberty to care for themselves, the persons depend totally on the state to secure basic necessities. The incarcerated must depend on the state to make the most basic decisions vital to their health and safety.¹⁰⁸ The Eighth Amendment requires that the state act humanely in making these decisions on its ward's behalf.¹⁰⁹ The amendment prohibits any unnecessary and wanton infliction of pain that is totally without "penological justification."¹¹⁰ Thus, because the court judged the conditions of confinement against society's evolving standards of decency, not in relation to whether the punishment inflicts physical pain,¹¹¹ it held that not only is exposure to ETS discomforting, confinement involving such exposure may constitute cruel and unusual punishment under the Eighth Amendment.¹¹²

In defining society's standards of decency the *McKinney* court looked to *Avery v. Powell*¹¹³ and *Clemmons v. Bohannon*.¹¹⁴ The United States District Court for the District of New Hampshire in *Avery* determined that, because widely accepted scientific and medical documentation shows that ETS poses health risks, a prisoner's involuntary exposure to ETS may be cruel and unusual punishment for Eighth Amendment purposes.¹¹⁵ The court observed that forty-five states and the District of Columbia had enacted laws restricting smoking,¹¹⁶ and that the federal government has passed laws and regulations aimed at reducing exposure to ETS on interstate passenger carriers¹¹⁷ and in government controlled and operated build-

¹⁰⁶ *Id.* at 1503.

¹⁰⁷ *Id.* at 1504 (citing *Hutto v. Finney*, 437 U.S. 678, 685 (1978)).

¹⁰⁸ *Clemmons v. Bohannon*, 918 F.2d 858, 862-63 (10th Cir. 1990).

¹⁰⁹ *Id.* at 863.

¹¹⁰ *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

¹¹¹ *Avery v. Powell*, 695 F. Supp. 632, 636 (D.N.H. 1988).

¹¹² *Id.* at 639.

¹¹³ See *McKinney v. Anderson*, 924 F.2d 1500, 1504 (9th Cir. 1990); see also *Avery*, 695 F. Supp. at 636.

¹¹⁴ *McKinney*, 924 F.2d at 1504; see also *Clemmons v. Bohannon*, 918 F.2d 858, 864 (10th Cir. 1990).

¹¹⁵ *Avery*, 695 F. Supp. at 639.

¹¹⁶ See, e.g., KAN. STAT. ANN. §§ 21-4009-4010 (1988); N.M. STAT. ANN. § 24-16-2 (1985).

¹¹⁷ 49 C.F.R. § 1061 (1987).

ings,¹¹⁸ including federal prisons.¹¹⁹ Based on these observations the court held that society's attitudes have evolved to the point that involuntary exposure to ETS may rise to the level of a violation of society's evolving standards of decency.¹²⁰

The United States Court of Appeals for the Tenth Circuit in *Clemmons* agreed with the *Avery* court that the type of exposure potentially faced by a nonsmoking prisoner double-celled with a smoker can violate the Eighth Amendment.¹²¹ The *Clemmons* court's decision reflected a long standing judicial recognition that exposing a prisoner to an unreasonable risk of debilitating or terminal disease offends society's evolving standards of decency.¹²² Based on its examination of *Avery* and *Clemmons*, the *McKinney* court held that confining prisoners to a six-foot by eight-foot room with poor ventilation and a smoking cellmate¹²³ constituted a violation of the Eighth Amendment.¹²⁴

Both state and federal courts have rejected arguments that the United States Constitution guarantees individuals the right to a clean smoke-free environment. One reason for courts' refusal has been that tobacco smoke pollution is not a problem of constitutional proportions, and that, like other environmental problems, its solution is best left to legislative bodies.¹²⁵ Even if courts recognized a general environmental right under the Constitution, or if Congress added such a right by amendment—as some state legislatures have added to state constitutions¹²⁶—enforcement solely by judicial action would be difficult.¹²⁷

B. Common Law Claims

Nonsmokers' common law claims to a right to a safe working environment have met with more success than the nonsmokers' con-

¹¹⁸ 41 C.F.R. §§ 101-20.105-3 (1987).

¹¹⁹ 28 C.F.R. § 551.160 (1987).

¹²⁰ *Avery v. Powell*, 695 F. Supp. 632, 639-40 (D.N.H. 1988).

¹²¹ *Clemmons v. Bohannon*, 918 F.2d 858, 864 (10th Cir. 1990).

¹²² *Id.*

¹²³ *McKinney v. Anderson*, 924 F.2d 1500, 1507 (9th Cir. 1991).

¹²⁴ *Id.* at 1509.

¹²⁵ See *Axel-Lute*, *supra* note 84, at 350-51; see also *Tanner v. Armco Steel Corp.*, 340 F. Supp. 532, 536 (S.D. Tex. 1972).

¹²⁶ *Vuich*, *supra* note 82, at 616. *Vuich* discusses Illinois's constitutional provision requiring maintenance of a healthy environment for the benefit of present and future generations. *Id.*

¹²⁷ *Axel-Lute*, *supra* note 84, at 353-54.

stitutional claims approach.¹²⁸ In *Shimp v. New Jersey Bell Telephone Co.*,¹²⁹ the New Jersey Superior Court held that an employer must restrict employee smoking to nonworking areas if cigarette smoke adversely affects an employee.¹³⁰ The plaintiff in *Shimp*, an office worker who was sensitive to cigarette smoke, sought an injunction to ensure a smoke-free area in her workplace.¹³¹ The company allowed other employees to smoke in the workplace, aggravating the plaintiff's allergy to smoke.¹³² The company installed an exhaust fan in the work area in an attempt to correct the problem, but later removed the fan after other employees complained of cold drafts from the fan.¹³³ Taking judicial notice of the dangers of passive smoking the New Jersey Superior Court held that the evidence of the health hazards of cigarette smoke to both smokers and nonsmokers was clear and overwhelming.¹³⁴ The court granted the plaintiff's injunction, noting that the right of a smoker to risk his or her own health does not include the right to jeopardize the health of those who must remain around the smoker in order to perform properly their jobs.¹³⁵

At least one other court has followed the *Shimp* court's decision to allow an action against an employer who forced an employee to work in a smoke-filled environment that caused injury to the employee.¹³⁶ In *McCarthy v. State of Washington Department of Social & Health Services*,¹³⁷ the Supreme Court of Washington accepted scientific and medical literature establishing that tobacco smoke was hazardous to the plaintiff and all employees within the area exposed to the cigarette smoke.¹³⁸ The court held that the employer had a common law duty to maintain a reasonably safe workplace and that a reasonably safe workplace meant a smoke-free workplace.¹³⁹

In *Gordon v. Raven Systems & Research Inc.*,¹⁴⁰ the District of Columbia Court of Appeals found that the employer was under no

¹²⁸ See, e.g., *Smith v. Western Elec. Co.*, 643 S.W. 2d 10, 13-14 (Mo. Ct. App. 1982); *Shimp v. New Jersey Bell Tel.*, 368 A.2d 408, 413 (N.J. Super. 1976).

¹²⁹ 368 A.2d 408 (N.J. Super. Ct. 1976).

¹³⁰ *Id.* at 416.

¹³¹ *Id.* at 409.

¹³² *Id.* at 410-11.

¹³³ *Id.* at 410.

¹³⁴ *Id.* at 415.

¹³⁵ *Id.*

¹³⁶ *McCarthy v. Dep't of Soc. & Health Serv.*, 759 P.2d 351, 354 (Wash. 1988).

¹³⁷ 759 P.2d 351 (Wash. 1988).

¹³⁸ *Id.* at 355.

¹³⁹ *Id.* at 354-55.

¹⁴⁰ 462 A.2d 10 (D.C. App. 1983).

common law duty to provide a smoke-free workplace.¹⁴¹ The plaintiff, who had a special sensitivity to tobacco smoke, brought suit claiming that her termination was unlawful because her employer was negligent in not supplying a smoke-free workplace.¹⁴² The *Gordon* court distinguished *Shimp* by emphasizing that the plaintiff did not provide the court with any medical evidence regarding cigarette smoke's detrimental effects.¹⁴³ Because the plaintiff did not provide thorough scientific documentation that cigarette smoke is hazardous to all workers, the court narrowed her claim to her own special sensitivities.¹⁴⁴ The court held that the common law does not impose upon employers the burden of conforming their workplace to the particular need or sensitivities of an individual employee.¹⁴⁵ Because the *Gordon* court denied plaintiff's claim on account of her failure to supply sufficient medical evidence of cigarette smoke's hazards, it is likely that more common law claims will be successful as more scientific and medical evidence link passive smoking to nonsmokers' endangered health.¹⁴⁶

C. Compensation Claims

The plethora of medical and scientific evidence on the health hazards of environmental tobacco smoke appears to strengthen claims workers can bring under employment and disability compensation statutes.¹⁴⁷ Increasing numbers of employees exposed to smoke in the workplace and afflicted with smoke-associated medical disorders are suing for unemployment benefits, disability payments, and workers' compensation.¹⁴⁸

In *Alexander v. California Unemployment Insurance Appeals Board*,¹⁴⁹ for example, the California Appeals Court recognized a hypersensitive nonsmoker's right to unemployment compensation after refusing to work in an area where smoking was permitted.¹⁵⁰ The court required the defendant to pay state unemployment insur-

¹⁴¹ *Id.* at 15.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See* Byrd, *supra* note 100, at 211.

¹⁴⁷ *Id.*

¹⁴⁸ *E.g.*, *Parodi v. Merit Sys. Protection Bd.*, 690 F.2d 731 (9th Cir. 1982); *McCrocklin v. Employment Dev. Dep't*, 205 Cal. Rptr. 156, 157, 156 Cal. App. 1067, 1071 (1984); *Schober v. Mountain Bell Tel.*, 630 P.2d 1231, 1233 (N.M. Ct. App. 1980).

¹⁴⁹ 163 Cal. Rptr. 411, 104 Cal. App. 3d 97 (1980).

¹⁵⁰ *Id.* at 413, 104 Cal. App. 3d at 97.

ance benefits to the plaintiff, an allergic nonsmoker, who terminated her employment because her employer failed to enforce a no-smoking policy in the plaintiff's work area.¹⁵¹ The California appellate court noted that the plaintiff had good cause for terminating her employment where tobacco smoke was present because such a work environment would be harmful to her health.¹⁵² The appellate court based part of its decision on the plaintiff's physician testimony that the plaintiff could work full-time in her job if the working conditions were smoke-free.¹⁵³ The *Alexander* court implicitly characterizes the plaintiff's allergic reaction to tobacco smoke as an environmental limitation rather than a physical limitation, by finding that the plaintiff was limited only by the conditions of her work environment and could perform her job in a smoke-free environment.¹⁵⁴ Because her employer would not enforce the no-smoking policy, and enforcement would remedy the plaintiff's problem, the plaintiff was entitled to unemployment benefits when her allergy to cigarette smoke forced her to quit her job.¹⁵⁵

In its decision in *Parodi v. Merit Systems Protection Board*,¹⁵⁶ the United States Court of Appeals for the Ninth Circuit ruled that a government worker who is hypersensitive to smoke is "environmentally disabled"—disabled due to environmental conditions—and thus eligible for disability benefits when working in a smoke-filled environment.¹⁵⁷ In *Parodi*, the plaintiff sought federal employment disability benefits, alleging that her reaction to cigarette smoke left her disabled.¹⁵⁸ When in the presence of cigarette smoke the plaintiff suffered from "asthmatic bronchitis with hyperirritable airways,"¹⁵⁹ and one physician stated that returning the plaintiff to her previous job in an office with smokers would endanger her health.¹⁶⁰ The *Parodi* court expressly characterized the plaintiff's reaction to tobacco smoke as an environmental limitation¹⁶¹—not a physical limitation¹⁶²—and stated that a person with an environmental limi-

¹⁵¹ *Id.* at 412, 104 Cal. App. 3d at 99–100.

¹⁵² *Id.* at 412, 104 Cal. App. 3d at 100.

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ *Id.*

¹⁵⁶ 690 F.2d 731 (1982), as amended, 702 F.2d 742 (9th Cir. 1983).

¹⁵⁷ *See id.*, 702 F.2d at 751.

¹⁵⁸ *Id.* at 744.

¹⁵⁹ *Id.* at 745.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 750.

¹⁶² *Id.*

tation, unlike a person with a physical limitation, can perform the work in a proper smoke-free environment.¹⁶³

D. Child Custody Cases

Considerations of smoking behavior and the health effects of ETS have entered judicial examinations of parent-child relationships.¹⁶⁴ Recently, there has been significant publicity about the impact of a parent's smoking habits on child custody determinations.¹⁶⁵ In one case a judge ordered a child removed from a home where parental smoking threatened the child's health, and both parents refused to modify their smoking behavior.¹⁶⁶ In the Fall of 1990, for the first time, a judge considered a parent's smoking habit in his deliberations over whether to award a parent custody.¹⁶⁷ In *Satalino v. Satalino*,¹⁶⁸ a judge for the New York Supreme Court in Nassau County found the court should consider smoking in a household, like alcohol consumption, when making child custody awards.¹⁶⁹ In *Satalino*,¹⁷⁰ a nonsmoking father petitioned the court for custody of his six-year-old son, asserting that he could provide a healthy, smoke-free environment for the child.¹⁷¹ Awarding custody to the child's mother would subject the child to the health hazards of secondhand smoke because the mother and her parents, with whom she resided, were all smokers.¹⁷² The judge, however, awarded custody of the child to the smoking mother because other factors outweighed the smoking issue.¹⁷³

¹⁶³ *Id.*

¹⁶⁴ See, e.g., *Satalino v. Satalino*, No. 11440-86 (N.Y. Sup. Ct., Oct. 19, 1990); *Badeaux v. Badeaux*, 541 So.2d 301, 302 (La. Ct. App. 1989); *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. Ct. App. 1988); *Roofeh v. Roofeh*, 525 N.Y.S.2d 765, 766 (Sup. Ct. 1988).

¹⁶⁵ See Natalie Finkelman, *To Smoke or Not to Smoke, That's the (Custody) Question*, PENNSYLVANIA L. J.-R., Apr. 29, 1991, at 4 col.1.

¹⁶⁶ ACTION ON SMOKING AND HEALTH (ASH), 21 SMOKING AND HEALTH REVIEW 4 (May-June 1991).

¹⁶⁷ Julie Gannon Shoop, *Smoking Parents Lose Points in Child-Custody Case*, 27 TRIAL 82, 82 (Feb. 1991).

¹⁶⁸ No. 11440-86 (N.Y. Sup. Ct. Oct. 19, 1990).

¹⁶⁹ *Id.*; see also Finkelman, *supra* note 165, at 4 col.1; Shoop, *supra* note 167, at 82.

¹⁷⁰ No. 11440-86 (N.Y. Sup. Ct., Oct. 19, 1990).

¹⁷¹ *Id.*

¹⁷² Finkelman, *supra* note 165, at 4 col.1.

¹⁷³ Shoop, *supra* note 167, at 82. Willard DaSilva, the father's attorney, stated that the weight of the smoking issues would vary from case to case. *Id.* He also believed that if all other factors were equal, the smoking environment could be the determinative factor in a child custody battle. *Id.*; see also Finkelman, *supra* note 165, at 4 col.2.

The Louisiana Appeals Court for the Fifth Circuit also considered a parent's smoking habits in a custody and visitation determination.¹⁷⁴ In *Badeaux v. Badeaux*,¹⁷⁵ the nonsmoking mother had physical custody of the child, and the smoking father had visitation rights.¹⁷⁶ The mother successfully petitioned the court for a reduction of the father's visitation rights.¹⁷⁷ The parties' one-year-old son was diagnosed as having asthma and subject to repeated upper respiratory infections for which he received antibiotics.¹⁷⁸ The father, his mother and step-father, with whom the father lived, were all smokers. The father admitted knowing that exposure to cigarette smoke was bad for the child.¹⁷⁹ When the trial court determined that it was in the child's best interest to spend more time with the mother, it cited cigarette smoking and its effects on the child's health as a reason for limiting visitation.¹⁸⁰

In *Pizzitola v. Pizzitola*,¹⁸¹ the Texas Court of Appeals granted a nonsmoking father custody of his daughter even though the mother was the child's primary caretaker during the marriage.¹⁸² The father testified that he helped the mother raise the child and that the mother smoked in the child's presence.¹⁸³ The father was especially concerned about the mother's smoking habit because the child was extremely allergic to smoke.¹⁸⁴ In deciding the issue, the jury considered each party's parental ability; their plans for the child; their home's stability; their acts or omissions; and their excuse for any acts or omissions.¹⁸⁵ After weighing all the facts, the jury determined that living with the father would be in the child's best interests.¹⁸⁶

In *Roofeh v. Roofeh*,¹⁸⁷ the Supreme Court of New York, Nassau County—exercising its inherent power to issue orders protecting health and safety—issued a temporary order restricting the wife's smoking habit in an attempt to safeguard her children's health and

¹⁷⁴ *Badeaux v. Badeaux*, 541 So.2d 301, 302-03 (La. Ct. App. 1989); see also Finkelman, *supra* note 165, at 4 col.2.

¹⁷⁵ 541 So.2d 301 (La. Ct. App. 1989).

¹⁷⁶ *Id.* at 302.

¹⁷⁷ *Id.* at 301-02.

¹⁷⁸ *Id.* at 302.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 302-03.

¹⁸¹ 748 S.W.2d 568 (Tex. Ct. App. 1988).

¹⁸² *Id.* at 570-71.

¹⁸³ *Id.* at 569.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 570.

¹⁸⁶ *Id.*

¹⁸⁷ 525 N.Y.S.2d 765 (Sup. Ct. 1988).

safety.¹⁸⁸ In *Roofeh*, the wife commenced a divorce action and the husband requested the court to restrict the wife's smoking habit in order to safeguard their children's health and safety.¹⁸⁹ The wife did not dispute the detrimental effects of smoking on both the smoker and those who passively inhale the smoker's cigarette smoke.¹⁹⁰ In view of the fact that the wife admitted ETS's harmful health effects, the court ordered the wife to refrain from smoking cigarettes in close proximity to the children and to confine her smoking in the residence to a specific area within the house, provided that none of the children were present in the room while she smoked.¹⁹¹

In all these cases, the moving party documented, and the courts accepted, the adverse effects of passive smoking on children's health.¹⁹² In *Satalino*, for example, Dr. William Cahan, emeritus lung surgeon at Memorial Sloan-Kettering Cancer Center in New York City and expert witness for the father in the *Satalino* case, testified that secondhand smoke is particularly dangerous to children.¹⁹³ In his concluding testimony, Dr. Cahan averred that sending a child to live in a home with heavy smokers is like returning a child to an asbestos-lined home or a home built on radioactive soil, because the children are in extreme danger when inhaling ETS.¹⁹⁴

IV. ANTI-SMOKING LEGISLATION

Although nonsmokers have had some success in asserting in the courts their right to a smoke-free environment, some courts believe that the legislature, not the judiciary, should address the problem of tobacco smoke as an indoor air pollutant.¹⁹⁵ Because smoking produces air pollution problems which affect the entire citizenry, a legislative, rather than a judicial, solution to the problem is more appropriate.¹⁹⁶ Legislative remedies offer more comprehensive pro-

¹⁸⁸ *Id.* at 769.

¹⁸⁹ *Id.* at 766.

¹⁹⁰ *Id.* at 769.

¹⁹¹ *Id.*

¹⁹² See *id.* at 766; see also *Badeaux v. Badeaux*, 541 So.2d 301, 302 (La. Ct. App. 1989); *Pizzitola v. Pizzitola*, 748 S.W.2d 568, 569 (Tex. Ct. App. 1988).

¹⁹³ Shoop, *supra* note 167, at 82.

¹⁹⁴ *Id.*

¹⁹⁵ See *Fed. Employees for Nonsmokers' Rights v. United States*, 446 F. Supp. 181, 185 (D.D.C. 1978), *aff'd without opinion*, 598 F.2d 310 (2d Cir. 1979), *cert. denied*, 444 U.S. 926 (1979). The district court stated that it firmly believed that such matters are better left to a legislative or administrative process where there can be a proper balancing of interests. 446 F. Supp. at 185.

¹⁹⁶ See *Gasper v. Louisiana Stadium & Exposition Dist.*, 418 F. Supp. 716, 720 (E.D. La.

tection and more effective enforcement than do judicial remedies.¹⁹⁷ Even smokers who accept the health hazards of their own mainstream smoke may not accept additional harm from secondary smoke.¹⁹⁸

A. *The Evolution of Anti-Smoking Legislation*

Enactment of American legislation restricting or prohibiting the sale or use of cigarettes began as early as the 1800s.¹⁹⁹ Early American prohibitions were designed to prevent fires and to protect the public from disease.²⁰⁰ Not until the end of the nineteenth century did state legislatures begin to pass legislation to control indoor air pollution.²⁰¹ This anti-smoking movement, however, was short lived.²⁰² After World War I, the public began to consider smoking an acceptable form of behavior.²⁰³ By 1927, state legislatures repealed all statutes restricting or prohibiting the sale or use of cigarettes.²⁰⁴

In the years between 1927 and 1964, few laws existed that either prohibited or limited smoking.²⁰⁵ Nonsmokers succumbed to societal pressure and either remained silent or learned to tolerate the wrath of smokers who resented anyone questioning their right to smoke.²⁰⁶ Beginning in the late 1970s, a plethora of scientific studies confirmed the danger that cigarette smoke presents to both smokers and nonsmokers.²⁰⁷ Upon learning that tobacco smoke jeopardized their

1976), *aff'd*, 577 F.2d 897 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979). The process of weighing one individual's right under the Fifth and Fourteenth Amendments, is better left to the processes of the legislative branches of government. *Id.*

¹⁹⁷ Axel-Lute, *supra* note 84, at 357.

¹⁹⁸ *Id.*

¹⁹⁹ Christopher Cobey, *The Resurgence and Validity of Antismoking Legislation*, 7 U.C. DAVIS L. REV. 167, 168 (1974).

²⁰⁰ See Grisham, *supra* note 12, at 910-11; see also Axel-Lute, *supra* note 84, at 345 (restrictions on smoking were to prevent immorality, disease, and fire); Swingle, *supra* note 7, at 445 (cigarette smoking was considered reprehensible and immoral, in addition to being a fire hazard).

²⁰¹ Axel-Lute, *supra* note 84, at 345; see e.g., UTAH CODE ANN. §§ 76-10-101 *et seq.* (1921 Utah Laws ch. 145, as amended, 1976 Utah Laws ch. 10).

²⁰² See Swingle, *supra* note 7, at 445.

²⁰³ See Axel-Lute, *supra* note 84, at 345; Zubinsky, *supra* note 2, at 185.

²⁰⁴ See Swingle, *supra* note 7, at 445; Zubinsky, *supra* note 2, at 185.

²⁰⁵ See Swingle, *supra* note 7, at 445.

²⁰⁶ See Axel-Lute, *supra* note 84, at 345.

²⁰⁷ See Swingle, *supra* note 7, at 444-45. In 1964 the Surgeon General determined that cigarette smoking was hazardous to the health of the smoker and proclaimed it a health hazard of sufficient magnitude to warrant remedial action. PUBLIC HEALTH SERVICE, U.S. DEPT OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH 33 (1964); see also Swingle, *supra* note

health, nonsmokers began asserting their right not to be harmed by tobacco smoke.²⁰⁸ Anti-smoking statutes began to appear once again.²⁰⁹ Unlike their predecessors, which sought to prohibit all smoking,²¹⁰ these modern anti-smoking statutes aimed only to protect people in public places from others' cigarette smoke.²¹¹ Presently, most states and the District of Columbia have some form of legislation regulating smoking in public places.²¹² Nationwide there are perhaps four hundred laws and ordinances restricting smoking.²¹³ The federal government also has promulgated nonsmoking regulations in certain areas, such as in federal workplaces,²¹⁴ and on domestic airline flights.²¹⁵

B. Constitutional Restrictions on Anti-Smoking Legislation

The Supreme Court has long acknowledged the existence of a right to privacy under the Fourteenth Amendment due process clause.²¹⁶ This right to privacy includes the right of personal autonomy and freedom from state intervention in actions and decisions that ought to be purely private.²¹⁷ Although the Constitution protects this right

7, at 444. The Surgeon General's report announced that cigarette smoking was not only dangerous to the smoker, but probably also dangerous to the people around the smoker. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH 117-35 (1972); see also Swingle, *supra* note 7, at 444-45. The 1975 and 1979 reports confirmed this finding. PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, SMOKING AND HEALTH vii (1979); PUBLIC HEALTH SERVICE, U.S. DEP'T OF HEALTH, EDUC. & WELFARE, THE HEALTH CONSEQUENCE OF SMOKING: A REPORT TO THE SURGEON GENERAL (1975); see also Swingle, *supra* note 7, at 445.

²⁰⁸ Swingle, *supra* note 7, at 446. See, e.g., *Gasper v. Louisiana Stadium & Exposition Dist.*, 577 F.2d 897, 899 (5th Cir. 1978), *cert. denied*, 439 U.S. 1073 (1979); *Shimp v. New Jersey Bell Tel.*, 368 A.2d 408, 413 (N.J. Super. Ct. 1976).

²⁰⁹ See, e.g., MASS. GEN. LAWS ANN. ch. 270, § 21 (West Supp. 1980); N.J. REV. STAT. § 2C:33-13 (Supp. 1979); see also Swingle, *supra* note 7, at 446.

²¹⁰ See Swingle, *supra* note 7, at 446; Zubinsky, *supra* note 2, at 186.

²¹¹ See, e.g., MASS. GEN. LAWS ANN. ch. 270, § 21 (West Supp. 1980); N.J. REV. STAT. § 2C:33-13 (Supp. 1979); see also Swingle, *supra* note 7, at 446.

²¹² Grisham, *supra* note 12, at 910-11. Most regulations addressing smoking problems are passed under the police powers of individual states and local governments. *Id.* at 909.

²¹³ See Thompson, *supra* note 104, at 498.

²¹⁴ See, e.g., 41 C.F.R. § 101-20.105-3(a)(1) (allows agencies to designate nonsmoking areas); see also Thompson, *supra* note 104, at 499.

²¹⁵ 49 U.S.C. § 1374(d)(1)(A) (West Supp. 1989); see also Grisham, *supra* note 12, at 907-09; Swingle, *supra* note 7, at 459-61.

²¹⁶ Over the past thirty years, the United States Supreme Court has established a fundamental right to privacy for individuals even though such a right is not explicit in the Constitution. See, e.g., *Roe v. Wade*, 410 U.S. 113, 116 (1973) (right to privacy); *Griswold v. Connecticut*, 381 U.S. 479, 482-83 (1965) (right to marital privacy and contraception).

²¹⁷ See, e.g., *Roe*, 410 U.S. at 116 (right to privacy, including woman's qualified right to

to privacy, it is not absolute.²¹⁸ The state can constitutionally infringe upon the right to privacy provided that the legislature narrowly tailors the regulation or policy to serve a compelling interest.²¹⁹ To determine the constitutionality of a regulation, the court engages in a balancing process: does the state interest in the regulation outweigh the individual interest in autonomy?²²⁰

Anti-smoking statutes aim to keep the air clean for people to breathe, and are upheld by the courts as a valid exercise of the state's police power.²²¹ The extent of the smoking regulation must bear some reasonable relation to the statute's purpose. If the regulation is too broad, a court is likely to strike it down as an unreasonable invasion of personal liberty.²²²

The United States Court of Appeals for the Tenth Circuit in *Grusendorf v. City of Oklahoma City*²²³ held that an off-duty smoking restriction on a public employee was a reasonable exercise of the state's police power and, thus, constitutional.²²⁴ Although the *Grusendorf* court held that the right to smoke while off duty is a liberty interest which is constitutionally protected by the Fifth and Fourteenth Amendments' substantive due process guarantees,²²⁵ the court held that the liberty was an ordinary rather than a fundamental

choose to terminate her pregnancy); *Griswold*, 381 U.S. at 382-83 (right to marital privacy and contraception).

²¹⁸ See *Roe*, 410 U.S. at 116. In *Roe*, the appeal presented constitutional challenges to a state statute that made abortion a criminal act. *Id.* The United States Supreme Court held that, although the state has a legitimate interest in protecting potential life, this interest was not compelling until the point of fetal viability. *Id.* at 163.

²¹⁹ See, e.g., *Horton v. Califano*, 472 F. Supp. 339, 343 (W.D. Va. 1979); *Gardner v. National Airlines*, 434 F. Supp. 249, 258 (S.D. Fla. 1977).

²²⁰ See *Carey v. Population Ser. Int'l*, 431 U.S. 678, 684-85 (1977) (court found New York statute prohibiting distribution of contraceptives to minors and advertising the sale of contraceptives unconstitutional); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (court found Oregon statute requiring minors to attend local public schools unconstitutional); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (court found Nebraska statute prohibiting foreign language instruction in schools unconstitutional). See also *Thompson*, *supra* note 104, at 509-10.

²²¹ See, e.g., *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 442 (1960); *Grusendorf v. City of Oklahoma City*, 816 F.2d 539, 543 (10th Cir. 1987); see also *Axel-Lute*, *supra* note 84, at 357.

²²² See *Zion v. Behrens*, 104 N.E. 836, 837-38 (Ill. 1914) (ordinance prohibiting all public smoking held void on grounds that the prohibition could not be justified on the grounds of either preventing annoyance and harm to other persons or preventing fire); *Hershberg v. Barbourville*, 133 S.W. 985, 986 (Ky. 1919) (ordinance forbidding cigarette smoking within corporate sphere struck down as an unreasonable invasion of privacy).

²²³ 816 F.2d 536 (10th Cir. 1987).

²²⁴ *Id.* at 543.

²²⁵ *Id.* at 541.

right.²²⁶ Thus, because the right to smoke is not fundamental, any plaintiff claiming that a smoking regulation violates his or her due process rights must allege that the statute is not rationally related to a legitimate state objective.²²⁷

V. LEGISLATIVE AND JUDICIAL CONTROL OF THE PARENT'S TREATMENT OF CHILDREN IN THE HOME

A. *State Child Abuse Law*

Child abuse and neglect is a widespread social problem that affects all types of family structure and all segments of the population.²²⁸ Each year thousands of reports of suspected child maltreatment are made to state protection agencies.²²⁹ To deal with the dilemma of suspected child maltreatment, legislatures in all fifty states and the District of Columbia have enacted statutes to protect children.²³⁰ Current child abuse and neglect statutes usually identify various types of behavior defined as child abuse or neglect, list the agencies responsible for abuse investigation, identify those individuals required to report abuse or neglect, and delineate penalties for failure to report.²³¹ Furthermore, state statutes typically contain clauses overriding professional responsibility—with the exception of the attorney-client privilege—and granting immunity from civil liability for good-faith reporting.²³²

When child abuse reporting statutes were first promulgated, only physicians were mandated statutorily to report suspected abuse cases.²³³ This was due to the belief that doctors were in a unique position to identify such cases.²³⁴ Over time, however, legislators

²²⁶ *Id.*

²²⁷ See Thompson, *supra* note 104, at 514.

²²⁸ OLIVER C.S. TZENG ET AL., THEORIES OF CHILD ABUSE AND NEGLECT: DIFFERENTIAL PERSPECTIVES, SUMMARIES, AND EVALUATIONS 4 (1991).

²²⁹ Susan Smith Hudson, *The Broadening Scope of Liability in Child Abuse Cases*, 27 J. FAM. L. 697, 697 (1988–89).

²³⁰ William W. Blue, *State v. Williquette: Protecting Children From Abuse Through the Imposition of a Legal Duty*, 12 AM. J. TRIAL ADVOC. 171, 171 (1988). See, e.g., MASS. GEN. L. ch. 119, § 51A-G (West 1991); N.J. STAT. ANN. §§ 9:6-8.9 to -8.20 (West 1976 & Supp. 1988) (reporting statute).

²³¹ See Blue, *supra* note 230, at 171–72 (comprehensive list of state child abuse statutes); Randy K. Otto & Gary B. Melton, *Trends in Legislation and Case Law on Child Abuse and Neglect*, in CHILDREN AT RISK: AN EVALUATION OF FACTORS CONTRIBUTING TO CHILD ABUSE AND NEGLECT 55, 63–64 (Robert T. Ammerman et al. eds. 1990).

²³² See Otto & Melton, *supra* note 231, at 64.

²³³ See *id.*

²³⁴ See *id.*

broadened reporting statutes to require most child professionals and many laypersons to report suspected abuse.²³⁵

Although reporting statutes have had an impact on the number of suspected abuse cases reported to the appropriate authorities, these statutes are not the cure-all that some might have desired.²³⁶ Reporting statutes are commonly criticized as unclear and overbroad.²³⁷ Some statutes mandate health-care and law-enforcement professionals to report abuse when "they have reasonable cause to suspect" abuse.²³⁸ What the professional must see and believe in order to report abuse and thereby comply with the statute, however, is left vague in most reporting statutes.²³⁹ With such vague reporting guidelines, it appears that whether or not a professional should report a suspected child abuse or neglect is a mere judgment call.²⁴⁰

Further complicating the matter is the issue of intent and the difficulty in reaching a consensus about what behavior constitutes abuse and neglect.²⁴¹ In *State v. Williquette*,²⁴² the Supreme Court of Wisconsin held that a mother who knowingly allows another person to abuse her child subjects the child to abuse within the meaning of Wisconsin's child abuse statute.²⁴³ The court deemed the statutory language ambiguous.²⁴⁴ Ruling that the word "subjects" in the relevant phrase "subjects a child" was nontechnical, the court stated that its appropriate meaning is one that may be ascertained from reading a regular dictionary definition.²⁴⁵ The court concluded that the ordinary and accepted meaning of "subjects" covers situations in which a person, with a duty to a child, exposes the child to a foreseeable risk of abuse.²⁴⁶ The court's interpretation of "subjects" did not limit the term's usage to persons actively participating in

²³⁵ See *id.* See, e.g., MASS. GEN. L. ch. 119, § 51A (West 1991) (requires specified professionals and nonprofessionals to report signs of serious physical or mental abuse of minors); ACTION ON SMOKING AND HEALTH (ASH), 21 SMOKING AND HEALTH REV. 6 (May-June 1991) (interprets Massachusetts law to require reporting if there is "reasonable cause to believe" that child has suffered even "de minimis injury").

²³⁶ See Otto & Melton, *supra* note 231, at 64.

²³⁷ See *id.*

²³⁸ N.Y. Social Services Law § 413 (McKinney 1988); see also Otto & Melton, *supra* note 231, at 64.

²³⁹ See Otto & Melton, *supra* note 231, at 64.

²⁴⁰ *Id.*

²⁴¹ See *id.* at 64-65.

²⁴² 385 N.W.2d 145 (Wis. 1986).

²⁴³ *Id.* at 147; see also Blue, *supra* note 230, at 172.

²⁴⁴ *Williquette*, 385 N.W.2d at 149.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 150; see also Blue, *supra* note 230, at 181.

abusing children.²⁴⁷ The court explained that its interpretation of the statute was consistent with the statute's purpose, which was to protect children from abuse without regard to culpable *mens rea*.²⁴⁸ Thus, it seems that courts are determined to punish those whose actions cause harm to children, no matter what the excuse.²⁴⁹

B. Child Abuse Prevention and Treatment Act of 1974

Prior to 1974, virtually all legislative and judicial activity on child maltreatment occurred at the state level.²⁵⁰ The passage of the federal Child Abuse Prevention and Treatment Act (CAPTA) of 1974²⁵¹ set the agenda for child abuse prevention and treatment at the federal level.²⁵² CAPTA attempts to establish a research agenda as well as a prevention and treatment program coordinated through the National Center on Child Abuse and Neglect (NCCAN).²⁵³ The act authorizes the director of NCCAN to collect, analyze, and report research results relating to child abuse; develop and maintain an information clearinghouse; gather and publish training materials; provide professional assistance through contracts and grants to aid private or public nonprofit organizations in the planning, development, and implementation of prevention and treatment programs; and conduct studies regarding causes and prevention of child abuse.²⁵⁴

In order to receive CAPTA funding, states must meet certain criteria relating primarily to investigation and reporting procedures.²⁵⁵ States must establish a system for abuse investigation and reporting, provide civil and criminal immunity for good-faith reporting, and assure confidentiality of all abuse reports and records.²⁵⁶ CAPTA also requires states to continue funding abuse programming

²⁴⁷ See Blue, *supra* note 230, at 181.

²⁴⁸ See *Williquette*, 385 N.W.2d at 150. See also *State v. Danforth*, 385 N.W.2d 125, 131 (1986) (child abuse does not require criminal intent). But cf., *Fabritz v. State*, 332 A.2d 324, 327 (Md. App. 1975), *cert. denied*, 425 U.S. 942 (1976) (reversed mother's conviction because evidence failed to show that she knew extent of daughter's injuries).

²⁴⁹ *Child Abuse*, 72 A.B.A. J. 72, 72 (Aug. 1, 1986).

²⁵⁰ See Otto & Melton, *supra* note 231, at 66.

²⁵¹ 42 U.S.C. §§ 5101-5118e (1988).

²⁵² Otto & Melton, *supra* note 231, at 66.

²⁵³ *Id.* at 67; see also Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101-5118e (1988).

²⁵⁴ CAPTA, 42 U.S.C. §§ 5101-5106h (1988); see also Otto & Melton, *supra* note 231, at 67.

²⁵⁵ Otto & Melton, *supra* note 231, at 67; see also CAPTA, 42 U.S.C. § 5106a (1988).

²⁵⁶ CAPTA, 42 U.S.C. § 1506a(b) (1988); see also Otto & Melton, *supra* note 231, at 67.

and extend preferential treatment to parental organizations established to prevent and treat child abuse.²⁵⁷

Since its promulgation in 1974, CAPTA's greatest impact has been the development of state child abuse reporting and investigation programs.²⁵⁸ Studies suggest that the reporting and investigation requirements have been effective in identifying abused and neglected children.²⁵⁹ It appears that an increasing number of professions are becoming more knowledgeable of, and increasing their compliance with reporting requirements.²⁶⁰

C. Other Legislation on Behalf of Children: Lead Poisoning

Lead poisoning is one of the most serious and widespread environmental diseases affecting children in the United States.²⁶¹ According to a report of the Agency for Toxic Substances and Disease Registry (ATSDR), a branch of the U.S. Public Health Service, more than three million children have levels of lead in their blood high enough to cause significant impairment to their neurological development.²⁶² These startling levels of contamination are the result of the pervasive use of lead products in our society.²⁶³ Although the primary sources of lead are pre-1977 paint, soil, and dust; lead can also be found in drinking water due to lead corrosion from water coolers and plumbing systems.²⁶⁴ Lead also is found in certain foods, resulting mostly from the use of lead solder in cans.²⁶⁵

Lead enters the body through the nose or mouth. Once in the body, lead is a powerful toxin with long-term harmful effects, including loss of short-term memory, decreased IQ, impairment of visual-motor functioning, underachievement in reading and spelling, and convulsions.²⁶⁶ Children under the age of six are at an especially

²⁵⁷ CAPTA, 42 U.S.C. § 5106c (1988); see also Otto & Melton, *supra* note 231, at 67.

²⁵⁸ See Otto & Melton, *supra* note 231, at 68.

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ See Jane Perkins, *Lead Poisoning Problems Challenged on Many Fronts*, 25 CLEARINGHOUSE REV. 13, 13 (May 1991). According to Dr. William Roper, Director of the federal Center for Disease Control, lead poisoning is the number one environmental problem facing America's children. *Id.*

²⁶² *Id.* (citing Agency for Toxic Substances and Disease Registry (ATSDR), *THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES: A REPORT TO CONGRESS* (1988) (available from the HHS/Public Health Service, Doc. No. 99-2966)). More than three million children translates into approximately one in six. *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

high risk of lead's negative effects, because their blood-brain barrier²⁶⁷ of the neurological system is still developing.²⁶⁸ Children are particularly susceptible to ingesting lead-based dust or paint that is peeling from dwellings built before 1977.²⁶⁹ Normal childhood behaviors, such as thumb-sucking and compulsive eating of nonfood items by toddlers only facilitate a child's contact with lead.²⁷⁰ Adding to the gravity of the problem is the fact that children absorb more lead in proportion to their weight than do adults.²⁷¹

Congress realized that the only foolproof method of preventing lead poisoning is the abatement of the hazard. Recognizing that in the case of lead paint on houses, abatement could be difficult and costly, Congress passes the Lead-Based Paint Poisoning Prevention Act.²⁷² The Act and its subsequent amendments direct the Secretary of Housing and Urban Development (HUD) to address the lead problem through demonstration projects and development of a plan to abate the use of lead-based paint in housing along with inspection requirements to see that such abatement is complied with.²⁷³ On December 13, 1990 HUD issued a report outlining a comprehensive plan to eliminate lead-based paint in private homes.²⁷⁴ The report concluded that the use of lead-based paint was pervasive, that three-quarters of the seventy-seven million private homes built before 1980 contain lead-based paint, and of those homes, families with children under seven occupy about ten million of them.²⁷⁵ The December 1990 report dealt exclusively with private housing, however, lead paint in publicly owned housing also presents a significant problem.²⁷⁶ Thus, pursuant to the Lead-Based Paint Poisoning Prevention Act, HUD issued interim guidelines for hazard identification and abate-

²⁶⁷ A membrane separating brain tissues from circulating blood. THE AMERICAN HERITAGE DICTIONARY 189 (2d College ed. 1985).

²⁶⁸ *Id.*

²⁶⁹ *Id.* (citing ATSDR, *supra* note 262, at I-49).

²⁷⁰ *Id.*

²⁷¹ *Id.* (citing ATSDR, CASE STUDIES IN ENVIRONMENTAL MEDICINE LEAD TOXICITY 4, 5 (Mar. 1990) (children absorb as much as fifty percent of the lead they ingest, compared to ten percent in adult)).

²⁷² 42 U.S.C. §§ 4801-4846 (1988).

²⁷³ Lead-Based Paint Poisoning Prevention Act, 42 U.S.C. §§ 4801-4846 (1988); *see also* Perkins, *supra* note 261, at 14.

²⁷⁴ *See* DEPT OF HOUSING AND URBAN DEV. (HUD), COMPREHENSIVE AND WORKABLE PLAN FOR THE ABATEMENT OF LEAD-BASED PAINT IN PRIVATELY OWNED HOUSING (Dec. 1990); *see also* Perkins, *supra* note 261, at 14.

²⁷⁵ *See* Perkins, *supra* note 261, at 14.

²⁷⁶ *See id.*

ment in public and Indian housing.²⁷⁷ States have echoed federal policy in their own lead paint legislation. For instance, Massachusetts has enacted similar provisions such as affirmative abatement and inspection.²⁷⁸ The Massachusetts statute, however, is more comprehensive because it applies to both private and public housing while the federal statute applies only to publicly owned housing.²⁷⁹ The Massachusetts legislature intended that courts construe the Massachusetts Act to protect the safety of residents of such dwellings.²⁸⁰ The Massachusetts Act requires the director of the Lead Poisoning Prevention Program to devote considerable effort to the detection and diagnosis of lead poisoning in children under six years of age.²⁸¹ Furthermore, the Massachusetts Act requires owners of residential property to take affirmative measures to eliminate any sources of lead paint in any residential premises where a child under six is either residing or will reside.²⁸² This mandate to remove any sources of lead paint in residential premises applies to parents whether or not they own the residence.²⁸³ Qualified inspectors have the authority to enter any residence to ensure that the owners are complying with the Act,²⁸⁴ and to impose penalties for noncompliance.²⁸⁵ The language of the Massachusetts Act indicates that the director should treat noncompliance violations as emergency matters requiring prompt action by owners of residential property in which children under age six reside.²⁸⁶ Accepting the findings that high levels of lead presented a grave danger to children and recognizing that neither these children's caretakers nor the owners of the residences in which these children live were taking actions to protect children from the harm of lead toxicity, both state legislatures and Congress promulgated legislation to remove the offending condition in order to protect children.²⁸⁷

²⁷⁷ See Fed. Reg. 14555-789 (Apr. 18, 1990); see also Perkins, *supra* note 261, at 14.

²⁷⁸ See MASS. GEN. L. ch. 111, § 194, 197 (1991).

²⁷⁹ See MASS. GEN. L. ch. 111, § 197; 42 U.S.C. § 4822 (1988).

²⁸⁰ See *Commonwealth v. Racine*, 363 N.E.2d 500, 504 (Mass. 1977); see also MASS. GEN. L. ch. 111, § 197 (1991).

²⁸¹ See MASS. GEN. L. ch. 111, §§ 193-194; see also *Racine*, 363 N.E.2d at 502.

²⁸² See MASS. GEN. L. ch. 111, § 197 (1991); *Racine*, 363 N.E.2d at 502.

²⁸³ See *Ankiewicz v. Kinder*, 563 N.E.2d 684, 687 (Mass. 1990).

²⁸⁴ MASS. GEN. L. ch. 111, § 194 (1991); compare 42 U.S.C. § 4822(d) (1988) (secretary shall require inspection of all public housing to make sure all lead-based paint is removed).

²⁸⁵ MASS. GEN. L. ch. 111, § 197; see also *Racine*, 363 N.E.2d at 504.

²⁸⁶ See *Racine*, 363 N.E.2d at 505-06; see also MASS. GEN. L. ch. 111, § 198 (1991).

²⁸⁷ See *Racine*, 363 N.E.2d at 506; Perkins, *supra* note 261, at 15.

D. Children's Causes of Action Against Parents

The common law afforded parents immunity from suits growing out of the parent-child relationship.²⁸⁸ The concept of parental immunity was created to promote family peace and unity.²⁸⁹ Recent cases show, however, that the parental immunity defense is complicated and not absolute.²⁹⁰ In fact, more than half the states have now abolished the doctrine of absolute immunity, either by case law or by statute.²⁹¹ In those states that have not abolished the defense, the courts now recognize various exceptions which have narrowed the scope of the defense.²⁹²

In those states where the immunity is abrogated, or where one of the exceptions applies, the courts have held that a general "reasonable parent" standard applies to the aspects of the parental relationship.²⁹³ Thus, the parental immunity defense bars suit by the child against the parent if the parent's alleged action falls within the exercise of parental authority or the ordinary parental discretion in providing clothing, food, medical care, and housing.²⁹⁴ The reasonableness of parental conduct hinges on the utility of the parent's conduct in relation to the extent of risk thereby created.²⁹⁵

Though the exact scope of "parental discretion" is unclear, case decisions may offer guidance in the determination.²⁹⁶ Where the alleged parental tort is failure to reasonably supervise the child,

²⁸⁸ See *Hewellette v. George*, 9 So. 885, 887 (Miss. 1891).

²⁸⁹ Mary J. Long & Davidson Ream, *Parent-Child Tort Immunity*, 32 FOR THE DEF. 23, 23 (Jan. 1990).

²⁹⁰ *Id.*

²⁹¹ W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 172, at 907 & n.62-63 (5th ed. 1984).

²⁹² See Long, *supra* note 289, at 23; KEETON, *supra* note 291, at 907-08. Frequent exceptions include emancipation of the child, where the defendant is standing *in loco parentis*, where the parent-child relationship has terminated due to the death of one of the parties prior to the suit, the wrongful death of the parent, where the tort is intentional, where the action involves rights other than personal injury, or where the child was injured in the course of the parent's business activity. KEETON, *supra* note 291, at 907-08.

²⁹³ See, e.g., *Gibson v. Gibson*, 479 P.2d 648, 653 (Cal. 1971) (court applied reasonable and prudent parent standard to charge of negligence brought by child against his father); *Grodin v. Grodin*, 301 N.W.2d 869, 871 (Mich. Ct. App. 1981) (court remanded for determination of reasonableness of alleged negligent conduct by mother).

²⁹⁴ *Grodin*, 301 N.W.2d at 870 (child may maintain suit against parent unless parent's alleged negligent act involves an exercise of reasonable parental authority or discretion); *Goller v. White*, 122 N.W.2d 193, 198 (Wis. 1963) (parental immunity will not be abrogated if act involved exercise of parental authority or ordinary parental discretion).

²⁹⁵ See *Grodin*, 301 N.W.2d at 871 (citing *Moning v. Alfonso*, 254 N.W.2d 759 (1977)).

²⁹⁶ See KEETON, *supra* note 291, at 908.

courts feel that juries should not be allowed to second-guess parents' judgment as to the appropriate amount of supervision their child needs.²⁹⁷ But where the parent is charged with the commission of an allegedly dangerous act, parental liability may be imposed.²⁹⁸

E. Constitutional Limitations and Restrictions to Controlling Smoking in the Home

A law intervening in the parent-child relationship may face the challenge that such a law violates substantive due process as guaranteed by the Fifth and Fourteenth Amendments, due to state- or federally-sponsored restriction on one's liberty interests.²⁹⁹ The right to raise, care, and have custody of one's children is a fundamental liberty interest under the United States Constitution.³⁰⁰ In *Pierce v. Society of Sisters*,³⁰¹ the Court struck down a statute requiring children to attend public school, thus preventing them from attending parochial or private ones.³⁰² The Court deemed the state law an unconstitutional interference with the liberty interest of parents and guardians to control their children's upbringing and education.³⁰³ This fundamental right, however, is not absolute.³⁰⁴ The Supreme Court recognized that the state has the duty and the right to protect minor children.³⁰⁵ In *Prince v. Massachusetts*,³⁰⁶ the Court stated that the family itself is not beyond regulation in the public interest.³⁰⁷ When acting to guard the general interest in a youth's well being, the state may restrict parent and guardian control.³⁰⁸

In determining whether a substantive liberty protected by the due process clause has been violated, courts must balance the liberty of

²⁹⁷ *Wright v. Wright*, 351 N.W.2d 868, 872 (Mich. Ct. App. 1984); *Holodook v. Spenser*, 324 N.E.2d 338, 343 (N.Y. 1974).

²⁹⁸ See *Grodin*, 301 N.W.2d at 871 (parents should be liable for negligent or intentional prenatal injury to child where mother ingests drugs that cause deformity).

²⁹⁹ See *supra* notes 210-20 & accompanying text.

³⁰⁰ See *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925).

³⁰¹ 268 U.S. 510 (1925).

³⁰² *Id.* at 531.

³⁰³ *Id.* at 535.

³⁰⁴ See *In Re Scott County Master Docket*, 672 F. Supp. 1152, 1164 (D. Minn. 1987).

³⁰⁵ See *Stanley v. Illinois*, 405 U.S. 645, 649 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

³⁰⁶ 321 U.S. 158 (1944).

³⁰⁷ *Id.* at 166.

³⁰⁸ *Id.* The state has a wide range of power for limiting parental freedom and authority in matters affecting the child's welfare. *Id.*

the individual and the demands of society.³⁰⁹ In seeking this balance, courts must weigh the individual's liberty interest against the state's asserted reasons for restricting such liberty.³¹⁰ The liberty interests of parents and guardians in safeguarding and preserving their family integrity are among the strongest recognized in law.³¹¹

Balanced against this interest is the state's interest in the welfare and protection of children.³¹² It cannot be disputed seriously that the state seeks to further a legitimate state interest when it attempts to protect the welfare of children.³¹³ As the Supreme Court recognized in *Lassiter v. Department of Social Services of Durham County, North Carolina*,³¹⁴ the state has an urgent interest in the welfare of the child.³¹⁵ Nevertheless, parents' and guardians' fundamental liberty interest in the care, custody, and management of their children "does not evaporate" simply because they have not been model parents or guardians.³¹⁶ Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.³¹⁷

VI. THE QUESTIONABLE VALIDITY OF RESTRICTING SMOKING IN THE HOME

Over the past few years, the public has become aware of the risks of cigarette smoke to nonsmokers' health.³¹⁸ Available scientific and medical evidence indicates that passive smoking, or the inhaling of ETS, is unhealthy, perhaps even life threatening.³¹⁹ ETS is particularly harmful to children because their bodily tissues are still developing.³²⁰ Thus, to ensure healthy body tissue development, it is prudent to eliminate ETS exposure from children's environments.³²¹

³⁰⁹ In Re Scott County Master Docket, 672 F. Supp. 1152, 1165 (citing *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982)).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ See *id.* (citing *Alsager v. District Court of Polk County, Iowa*, 406 F. Supp. 10, 22 (S.D. La. 1975), *aff'd*, 545 F.2d 1137 (5th Cir. 1979)).

³¹⁴ 452 U.S. 18 (1981).

³¹⁵ *Id.* at 27.

³¹⁶ *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

³¹⁷ *Id.*

³¹⁸ See *supra* notes 3-12 & accompanying text.

³¹⁹ See Grisham, *supra* note 12, at 903.

³²⁰ See *supra* notes 59-81 & accompanying text.

³²¹ *Measuring Exposures*, *supra* note 44, at 9; see also *supra* notes 59-81 & accompanying text.

State intervention to protect child welfare, however, can be supported only if no less intrusive action on family privacy and integrity would satisfy the state's legitimate interest in the health and welfare of dependent children.

A. *The Need for Action*

ETS is not, as initially perceived by researchers, exclusively a medical problem.³²² ETS is also an environmental and social problem whose consequences include indoor air pollution, and the cost of smoke-related diseases.³²³ Society's realization of these consequences has brought about a definite change in public opinion; nonsmokers are demanding a right to clean air at work, in public places, and on public transportation.³²⁴ Clean indoor air legislation not only reduces smokers' ability to smoke freely, but also highlights society's intolerance for smoking by defining smoking as an antisocial act.³²⁵ Adults have some choice as to the degree of smoke exposure they are willing to tolerate and public sentiment, for the most part, supports cleaning smoke from the air.³²⁶ To date, however, the public pays very little attention to the ways in which little children are exposed to smoke.³²⁷ Children suffer exactly the same physical irritations from tobacco smoke as adults, but unlike adults, children usually have no choice but to live with these smoke induced irritations.³²⁸ In other words, children are defenseless when it comes to protecting themselves from the harms of tobacco smoke pollution.

Courts have protected employees from smoke filled environments in the workplace.³²⁹ It seems logical, then, that the court should similarly protect children who are subject to harm from ETS. Granted, children do not enter into any type of contract with their parents or guardians, as employees do with their employers. Notwithstanding the employer-employee contractual relationship, however, the purpose of the right to a smoke-free workplace is to protect a person's health from the physical irritations and harmful effects caused by tobacco smoke in the workplace.³³⁰ The essence of any

³²² Grisham, *supra* note 12, at 902.

³²³ *Id.*

³²⁴ See *supra* notes 128-52 & accompanying text.

³²⁵ See *supra* notes 128-52 & accompanying text.

³²⁶ MICHELL, *supra* note 1, at 2.

³²⁷ *Id.*

³²⁸ See *supra* notes 59-81 & accompanying text.

³²⁹ See *supra* notes 128-52 & accompanying text.

³³⁰ See *Shimp v. New Jersey Bell Tel.*, 368 A.2d 408, 415-16 (N.J. Super. Ct. 1976).

actions taken by courts with respect to in-home smoking would be to provide children with the same protection granted to employees: rights to a healthy environment.

The right to safe and healthful working conditions is ensured by the duty imposed by common law upon employers.³³¹ The common law premise is that the employer must use reasonable care to provide a proper and safe place for the employee to work, and failure to protect the employee from unnecessary risk will cause the employer to be liable for any damages which ensue.³³² Similarly, the right to safe and healthful home living conditions for children is protected by the Child Abuse Prevention and Treatment Act (CAPTA).³³³ Courts can use CAPTA to find a duty for children's caretakers to assure that children are provided safe and healthful smoke-free home environments.³³⁴ Advocates, noting that in-home smoking can double a child's risk of eventually contracting lung cancer, feel that CAPTA applies to children subject to tobacco smoke pollution because forcing a child to bear such risks constitutes maltreatment.³³⁵

Like the workplace where a nonsmoker is required to spend the eight hour workday at his or her assigned spot and suffer the physical irritations and possible long-term health effects of tobacco smoke, the home is where children spend the majority of their day. Like the nonsmoking employees who suffer the physical irritations and possible long term effects of inhaling their co-workers' tobacco smoke, children suffer the same physical irritations as these workers and, because of their developing body tissues, are perhaps at a greater risk of suffering the long-term effects of inhaling tobacco smoke.

Furthermore, the prison cases serve to show society's recognition of ETS's risks.³³⁶ The underlying motivation to find in favor of non-smoking prisoners on the issue of compelled exposure to ETS is the right to be free from unreasonable risk of harm to one's health, and that subjecting one to such health risks violates society's standards of decency. The rulings in the prison cases demonstrate that society does not tolerate exposing inmates to hazardous levels of any carcinogen.³³⁷ Thus, it only seems logical that society would not tolerate

³³¹ See *supra* notes 128-46 & accompanying text.

³³² See *supra* notes 128-46 & accompanying text.

³³³ 42 U.S.C. §§ 5101-5118e (1988); see *supra* notes 250-60 & accompanying text.

³³⁴ See ACTION ON SMOKING AND HEALTH (ASH), CHILD ABUSE COMPLAINTS: A NEW WEAPON TO PROTECT NONSMOKERS?, 21 SMOKING AND HEALTH REV. 4 (May-June 1991).

³³⁵ *Id.* at 5.

³³⁶ See *supra* notes 104-27 & accompanying text.

³³⁷ See *supra* notes 104-27 & accompanying text.

exposing children to such dangers, and would want to protect children from ETS exposure in their homes.

Congress' Lead-Based Paint Poisoning Prevention Act,³³⁸ and its counterparts enacted by state statute,³³⁹ exemplify how federal and state governments have the authority to regulate personal activity and intervene in family privacy for the protection of the public health, safety, and welfare.³⁴⁰ Upon finding that lead poisoning is the number one environmental problem facing America's children, realizing that the only method of preventing lead poisoning is eliminating the hazard, and recognizing that neither the children's caretakers nor the owners of the residences in which children live were taking actions to protect children from lead toxicity, Congress and state legislatures took measures to protect children from lead's harm.³⁴¹ The provisions of these Acts, attempt to protect the safety and health of residents from the harms of lead, by allowing qualified inspectors to enter any residence to ensure compliance with the Acts.³⁴² If the Act is violated, homeowners, including parents and guardians, are liable for failing to comply with abatement provisions.³⁴³ Thus, in an effort to protect children from the harm of lead ingestion, family privacy is not immune from governmental intrusion.

Smoking within the home in the presence of children, like lead poisoning, is an environmental danger facing children.³⁴⁴ As in lead poisoning, neither children's caretakers nor other persons who smoke within the home are taking any actions to protect children from the adverse health effects of ETS. The lead-based paint legislation could serve as a model to show that when children's caretakers do not take responsibility for protecting their children, it is up to the state to step in and do so.

B. The Likelihood of Successfully Controlling Smoking in the Home

Although the state's power to intervene in the parent-child relationship is broadly defined, it is not without limits.³⁴⁵ Society places

³³⁸ 42 U.S.C. §§ 4801-4846 (1988); see *supra* notes 261-87 & accompanying text.

³³⁹ See e.g., MASS. GEN. L. ch. 111, §§ 190-99 (1991); see *supra* notes 261-87 & accompanying text.

³⁴⁰ See *supra* notes 261-87, 299-317 & accompanying text.

³⁴¹ See *supra* notes 228-87 & accompanying text.

³⁴² See *supra* notes 280-86 & accompanying text.

³⁴³ See MASS. GEN. L. ch. 111, § 197 (1991); see also *Racine v. Commonwealth*, 363 N.E.2d 500, 504 (Mass. 1977).

³⁴⁴ See MICHELL, *supra* note 1, at 15-19; see *supra* notes 59-78 & accompanying text.

³⁴⁵ See *supra* notes 299-311 & accompanying text.

a high value on family privacy. Thus, state action to protect child welfare is allowed only if it is the least intrusive invasion of family privacy that would satisfy the state's compelling interest to protect minors.³⁴⁶

If the state considers forcing children to bear the risks of ETS inhalation as maltreatment, it appears that in-home smoking could be restricted under CAPTA. As a practical matter, however, because of enforcement problems, CAPTA legislation probably could not control effectively smoking behavior in the home while in the presence of children. The only way to monitor domestic smoking would be to have another person document smoking behavior in the home, or to subject children who live with smokers to an occasional blood, urine, or saliva test to detect nicotine.³⁴⁷ The possibility of disrupting family relationships and privacy, as well as the unreliability of documenters and test results, do not place these monitoring options in a favorable light. Furthermore, such intervention into family privacy may be unconstitutional because it is not the least intrusive means to protect children.³⁴⁸

Although private causes of action are expensive and time consuming, they can be more effective than legislation in attempting to control in-home smoking. In case-by-case adjudication courts can examine all the evidence and tailor a remedy that is in the best interests of the child in the same way that courts make child-custody determinations. In cases where in-home smoking in the presence of a child with serious asthma or other respiratory problems can literally endanger the minor's life by triggering respiratory distress,³⁴⁹ intervention into family privacy and integrity, via restricting in-home smoking behavior, would probably be appropriate, and allowed, in order to safeguard the health and safety of the child. Unfortunately, enforcement of the smoking restriction may be just as difficult as in legislative attempts at restriction. Often it will be

³⁴⁶ See Otto & Melton, *supra* note 231, at 56.

³⁴⁷ See ACTION ON SMOKING AND HEALTH (ASH), CHILD ABUSE COMPLAINTS: A NEW WEAPON TO PROTECT NONSMOKERS?, 21 SMOKING AND HEALTH REV. 5 (May-June 1991).

³⁴⁸ See *supra* notes 299-317 & accompanying text. A less intrusive means of control for in-home smoking in the presence of children may be a state- or federally-funded education program that encourages in-home smokers to restrict their smoking to specific areas within the family residence provided that no children are present in those areas while smoking is occurring. See Axel-Lute, *supra* note 84, at 364. Advertising is another possible, less intrusive means with which to educate in-home smokers on the effects of ETS, and hopefully persuade them to change their behavior. See *id.*

³⁴⁹ See ACTION ON SMOKING AND HEALTH (ASH), CHILD ABUSE COMPLAINTS: A NEW WEAPON TO PROTECT NONSMOKERS?, 21 SMOKING AND HEALTH REV. 4 (May-June 1991).

up to other persons living in the home or unrelated adults to report and document smokers' behavior.

VII. CONCLUSION

The Surgeon General's 1986 report on the adverse health effects of ETS prompted nonsmokers to speak out about and assert their right to a smoke-free environment. The pending release of a 1990 EPA report that focuses on the health effects of passive smoking with respect to lung cancer in adults and respiratory disorders in children will probably become a topic for debate in the ongoing struggle between smoking and nonsmoking forces. Judicial action to reduce smoking has had some success, and continuing studies substantiating the health risks of ETS inhalation will probably make health related smoking claims even more promising for success in the future. For the most part, the judiciary has encountered only adult nonsmoker claims for smoke-related harm occurring in the workplace or in prisons. Now that studies have shown that children may be more susceptible to damage from ETS inhalation, smoking habits of parents and caretakers are considered by courts in child custody cases. Because children's major exposure to ETS occurs when they live in a home with smokers, requiring caretakers to modify their smoking behavior and stop smoking in the presence of children, confining smoking to other portions of the home, seems reasonable.

While courts and the legislature, under CAPTA, may be able to restrict in-home smoking behavior, these restrictions may not be effective in their attempt to protect children from the risks of ETS inhalation. Enforcement of such restrictions would be problematic because monitoring smokers' compliance is difficult. Smokers could easily claim that they are complying with the smoking restriction. Disproving the smoker's denial would be difficult, or too intrusive. Thus, although ETS is a terrible health problem, especially for children, it may be a problem that the law cannot help.